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No. 65.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

**BARTHOLOMEW SULLIVAN, MARGARET
THOLEN, JOHN MARTIN ET AL.,
APPELLANTS,**

VS.

JANE KIDD, APPELLEE.

**SUPPLEMENTAL BRIEF ON BEHALF OF
APPELLEE.**

**O. H. DEAN,
H. M. LANGWORTHY,
R. B. THOMSON,
R. D. WILLIAMS,**
Solicitors for Appellee.

**J. E. MADDEN,
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Of Counsel.

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This case was first argued and submitted in April, 1920. On May 17th, 1920, this court ordered that the case be restored to the docket for oral argument, and that the clerk notify the Solicitor General of the United States and the Attorney-General of the State of Kansas of the pendency of the cause (*Sullivan et al. v. Kidd*, 40 Sup. Ct. Rep. 484).

Since that time, important official correspondence, not available in this country, bearing directly upon the proper construction of the treaty in question, has been located and procured, for the first time, from the British Foreign Office at London. Also, the Solicitor General of the United States has recently filed a brief, setting forth the views of the State Department with respect to the construction of the Treaty. For these reasons, we desire to submit the following supplemental brief and argument on behalf of appellee, which, however, is not intended to supersede the "Brief on Behalf of Appellee" heretofore filed herein, but merely to be supplemental thereto.

I.

An examination of Article IV of the Treaty "in the light of attendant and surrounding circumstances" (In re Ross, Petitioner, 140 U. S. 1. c. 475), indicates that the restrictions therein contained were intended to be territorial and not personal.

The chief subject of discussion in the brief filed by the Solicitor General is the proper construction of Article IV of the treaty in question.

The official correspondence above referred to bears upon the same subject.

Article IV of the Treaty, is as follows:

"The stipulations of the present Convention shall not be applicable to any of the Colonies or foreign possessions of Her Britannic Majesty unless

notice to that effect shall have been given, on behalf of any such Colony or foreign possession by Her Britannic Majesty's Representative at Washington to the United States Secretary of State, within one year from the date of the exchange of the ratifications of the present Convention.

It is understood that under the provisions of this Article, Her Majesty can in the same manner give notice of adhesion on behalf of any British Protectorate or sphere of influence, or on behalf of the Island of Cyprus, in virtue of the Convention of the 4th of June, 1878, between Great Britain and Turkey.

The provisions of this Convention shall extend and apply to any territory or territories pertaining to or occupied and governed by the United States beyond the seas, only upon notice to that effect being given by the Representative of the United States at London, by direction of the treaty making power of the United States."

In the year 1894 (5 years previous to the negotiation of the treaty under discussion) Great Britain concluded a treaty with Japan (Treaty of Commerce and Navigation between Great Britain and Japan), Article XIX of which is very similar to Article IV of the Treaty between this country and Great Britain.

Article XIX of the British-Japanese Treaty is as follows (British and Foreign State Papers, Vol. 86, 1893-1894, p. 46):

"XIX. The stipulations of the present Treaty shall be applicable so far as the laws permit, to all the Colonies and foreign possessions of Her Britannic Majesty, excepting to those hereinafter named, that is to say, except to—

India.
 The Dominion of Canada.
 Newfoundland.
 The Cape.
 Natal.
 New South Wales.
 Victoria.
 Queensland.
 Tasmania.
 South Australia.
 Western Australia.
 New Zealand.

Provided always that the stipulations of the present Treaty shall be made applicable to any of the above-named Colonies or foreign possessions on whose behalf notice to that effect shall have been given to the Japanese Government by Her Britannic Majesty's Representatives at Tokio within two years from the date of the exchange of ratifications of the present Treaty."

The foregoing Article of the Japanese Treaty became the subject of diplomatic correspondence in the year 1899, just before the treaty between this country and Great Britain was concluded on March 2, 1899. This correspondence was further amplified in October, 1899, long before the treaty with this country was ratified and proclaimed in the year 1900.

By that correspondence Great Britain distinctly and unequivocally announced its interpretation of a treaty provision similar to Article IV of the Treaty under discussion.

This correspondence is on file with the "Librarian and Keeper of the Papers of His Majesty's Foreign Office" at London, and a complete copy thereof (recently

procured), together with the certificate of the Librarian, is set forth in the appendix to this brief. The original certified copy will be placed on file with the clerk of this court.

In this correspondence, Lord Salisbury in a letter dated February 22, 1899, addressed to Sir E. Satow, said:

"I have had under my consideration in consultation with the Law Officers of the Crown your despatch, No. 142, of the 6th September, respecting the status of Indian and Colonial subjects of Her Majesty residing in Japan, as affected by the Treaty of the 16th July, 1894.

Her Majesty's Government are of opinion that Article XIX of the Treaty has not the effect of limiting the rights of British subjects connected with non-adhering Colonies or possessions. The question as to who are British subjects for the purposes of the Treaty is one of British Law.

Many of the persons resident in the Colonies would be British subjects even if they had been born in a foreign country as being the children or grandchildren of natural-born British subjects, and it is impossible to suppose that such persons lose the benefits of this Treaty owing to the fact that they have been born in a British Colony and not in a foreign country.

No test can be suggested for discrimination against persons connected with non-adhering Colonies or possessions. The inhabitants of such Colonies or possessions are generally, and not locally merely, British subjects. They enjoy the privileges of citizenship all over the Empire.

Her Majesty's Government are of opinion that the test of domicile could not be applied in practice and the test of residence which has also been sug-

gested appears to be even more impracticable, as residence varies from time to time and it could not be said of any colonist who came to Japan that he was then resident in the Colony.

It must be recollected that British subjects inhabiting non-adhering Colonies and Dependencies are affected by this Treaty, inasmuch as when it comes into force it puts an end to the earlier Treaties under which they enjoy a right to extraterritoriality.

The fair meaning of the Treaty, in the opinion of Her Majesty's Government, is that all persons who by British Law are recognized as possessing the rights of British citizenship all over the world are entitled to the benefits of its stipulations, and this test includes the inhabitants, being British subjects, of all Colonies and Dependencies whether they adhere to the Treaty or not.

Her Majesty's Government are of opinion that Article XIX does not discriminate between different classes of British subjects, nor create a distinction unknown to British Law and almost impossible of definition, but that its effect is merely to provide that the privileges and obligations of the Treaty shall not ensure for the benefit of non-adhering Colonies and Dependencies. For instance, the produce or manufacture of a non-adhering Colony or Dependency, would not be entitled to the Tariff prescribed by the Treaty.

Should the occasion arise you should inform the Japanese Government of the construction which Her Majesty's Government place upon the Treaty as set forth in the above observations, pointing out the impossibility of the proposed distinction, and that the discrimination introduced by Article XIX is territorial merely and not personal."

Later in a letter, dated October 19, 1899, also addressed to Sir E. Satow, Lord Salisbury said:

"I have had under my consideration, in consultation with the Law Officers of the Crown, your despatch No. 133, Confidential, of the 27th July, relative to the question of the rights of Indian and Colonial subjects of Her Majesty to the protection of their industrial property in Japan, as affected by the Treaty between this country and Japan of the 16th July, 1894.

I am advised that British subjects, though residing in or domiciled in Colonies or possessions which have not adhered, are entitled to the benefits of Article XVII of the Treaty, and also of Article II of the International Convention for the Protection of Industrial Property, signed at Paris on the 20th March, 1883, which contains the following provision:

'Les sujets ou citoyens de chacun des Etats Contractants jouiront, dans tous les autres Etats de l'Union, en ce qui concerne les brevets d'invention, les dessins ou modeles industriels, les marques de fabrique ou de commerce et le nom commercial, des avantages que les lois respectives accorderont actuellement ou accorderont par la suite aux nationaux.'

(The subjects or citizens of each of the Contracting States shall enjoy, in all the other States of the Union, in that which concerns the patents of invention, the industrial designs or models, the manufacturing or commercial trade-marks and the commercial name, the advantages which the respective laws shall accord to the nations at the present time or afterwards.)

The right is conferred on those who are British subjects, and is not lost by their being resident or domiciled either in a foreign country or in a Colony which has not adhered.

The right under the Convention is also conferred by Article III on foreigners domiciled in one of the Contracting States. Of course, domicile in a

non-adhering Colony would not be effectual for this purpose, as the test is, in this instance, local, not personal as in the case of British subjects. This distinction is also illustrated by Articles IV and VI of the Convention, which would not apply in the case of non-adhering Colonies" (The above translation is ours).

It appears from the foregoing, that prior to the time that the Treaty in question was concluded, and substantially at the same time, the British Foreign Office promulgated an interpretation of an Article similar to Article IV of the Treaty between this country and Great Britain, by which the Foreign Office clearly and definitely declared its understanding of that article.

Applying the same interpretation to Article IV of the British-American Treaty of 1899, as that applied to Article XIX of the British-Japanese Treaty, it is apparent that the limitations of Article IV were intended to be territorial only and not personal; and that the failure to give notice of adhesion on behalf of Canada, has the effect merely of making the stipulations of the Treaty inapplicable to real and personal property situated in the Canadian territory; but failure to give notice of adhesion has no effect upon the rights of a British subject, because he happens to reside in Canada. (As a matter of fact, as elsewhere pointed out in this brief, Canada has enacted legislation which gives to citizens of the United States even broader rights with reference to the inheritance of real and personal property situated in Canadian territory, than would have been granted by notice of adhesion to the treaty.)

It is inconceivable that the interpretation placed upon Article XIX of the Japanese Treaty, by Great Britain, in February, 1899, was unknown to the representatives of this country who negotiated the British-American Treaty, concluded in March, 1899, and as there appears to be no record of a public expression of a different view by our State Department, it would seem that this country under well recognized rules relating to the interpretation of treaties, must be deemed to have acquiesced in and is bound by the interpretation placed upon this treaty provision by Great Britain.

It is unthinkable that any representative of this country, after the foregoing declaration by Great Britain of its interpretation of a treaty provision, should have adopted substantially the same language in a treaty subsequently concluded between this country and Great Britain, with the secret intention that such language should be construed other than in accordance with the views announced by the British Foreign Office.

In the case of *Rocca v. Thompson*, 223 U. S. 317, l. c. 332, Mr. Justice Day, speaking for this court, said:

"It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms."

So in this case, had it been the intention that the limitations of Article IV of the British-American Treaty should be other than territorial, as construed by Great Britain, "it would have been very easy to have declared that purpose in unmistakable terms."

This was not done, and it would seem that this country is clearly bound by the interpretation which Great Britain has placed upon this treaty, and under the terms of which the appellee is entitled to receive her proportionate share of the proceeds of the sale of the real estate in question.

As previously pointed out (Brief on Behalf of Appellee, pages 19 to 22, inclusive) treaties "are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith."

1 Kent's Commentaries, 174.

Shanks v. Dupont, 3 Peters, 242, 1. c. 249.

Hauenstein v. Lynham, 100 U. S. 483, 1. c. 487.

Geofroy v. Riggs, 133 U. S. 258, 271.

In re Ross, Petitioner, 140 U. S. 453, 1. c. 475.

United States v. Texas, 162 U. S. 1, 1. c. 36.

In an Article on "Treaties" (38 Cyc. 961) written by Mr. Justice William R. Day and Mr. Charles Henry Butler, in discussing the construction and operation of treaties, it is stated, among other things, that "a treaty should be construed as a whole, and *in the light of the circumstances and conditions existing at the time it was entered into* * * *" (our italics).

In support of the text, the authors cite *Ross v. McIntyre*, 140 U. S. 453; *Strother v. Lucas*, 12 Peters (U. S.) 410, and *United States v. Payne*, 8 Fed. 883.

In the case of *Ross v. McIntyre* (*In re Ross, Petitioner*), 140 U. S. 430, l. c. 475, this court said:

"It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose *all of its provisions must be examined in the light of attendant and surrounding circumstances*" (our italics).

In the case of *Strother v. Lucas*, 12 Peters, 410, l. c. 438, this court in discussing a treaty by which territory was ceded by one sovereign power to another, and particularly the effect of such a treaty upon the title to land held by individuals, said:

"The terms of a treaty are to be applied to the state of things then existing in the ceded territory, 8 Peters, 462;"

In the case of *United States v. Payne*, 8 Fed. Rep. 883, above referred to, the court said (p. 892):

"A treaty, like a statute or contract, must be construed to give it effect, if possible, and courts always adhere to this rule. In construing this treaty we have a right to take into consideration the situation of the parties to it at the time it was made, the property which is the subject-matter of the treaty, and the intention and purposes of the parties in making the treaty. To get at this intention *we have a right to consider the construction the parties to the treaty, and who were to be affected by it, have given it and what has been their action under it*" (our italics).

The rules for the interpretation of treaties are enumerated in Oppenheim on International Law (Vol. I, p. 560), as follows:

"It is of importance to enumerate some rules of interpretation which recommend themselves, because everybody agrees upon their suitability.

(1) All treaties must be interpreted according to their reasonable in contradistinction to their literal sense. An excellent example illustrating this rule is the following, which is quoted by several writers: In the interest of Great Britain the Treaty of Peace of Utrecht of 1713 stipulated in Article 9 that the port and the fortification of Dunkirk should be destroyed and never be rebuilt. France complied with this stipulation, but at the same time began building an even larger port at Mardyck, a league off Dunkirk. Great Britain protested on the ground that France in so acting was violating the reasonable, although not the literal, sense of the Peace of Utrecht, and France recognized in the end this interpretation and discontinued the building of the new port.

(2) The terms used in a treaty must be interpreted according to their usual meaning in the language of every-day life, provided they are not expressly used in a certain technical meaning or another meaning is not apparent from the context.

(3) It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty, and something not inconsistent with generally recognized principles of International Law and with previous treaty obligations toward third states. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the pur-

pose of the treaty, the consistent meaning to the meaning inconsistent with general recognized principles of International Law and with previous treaty obligations toward third states.

(4) The principle *in dubio mitius* must be applied in interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, the meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties' territorial and personal supremacy, or which contains less general restrictions upon the parties.

(5) *Previous treaties between the same parties, and treaties between one of the parties and third parties, may be alluded to for the purpose of clearing up the meaning of a stipulation* (our italics).

(6) If there is a discrepancy between the clear meaning of a stipulation, on the one hand, and, on the other, the intentions of one of the parties declared during the negotiations preceding the signing of a treaty, the decision must depend on the merits of the special case. If, for instance, the discrepancy was produced through a mere clerical error or by some other kind of mistake, it is obvious that the interpretation is necessary in accordance with the real intentions of the contracting parties."

Examining the treaty under consideration "in the light of attendant and surrounding circumstances" (*In re Ross, Petitioner*, 140 U. S. 453, l. c. 475), the following considerations are pertinent:

(1) The preamble to the treaty recites that the purpose of the treaty is "to improve the condition of the citizens and subjects of each of the respective countries in relation to the tenure and disposition of real and personal property situated or being within the territories

of the other," etc. There is no apparent reason why either of the contracting parties should desire to restrict the rights to be secured for their respective subjects because of the domicile or residence of such citizens. No considerations of policy would seem to require such restriction. In fact, it is hardly conceivable that a Mother Country would desire to discriminate against some of its subjects, by providing for restrictions applicable to subjects who happen to be domiciled within its colonies (perhaps in the interest of the Mother Country), when such restrictions do not apply, for instance, to subjects residing in a foreign country, and who perhaps are but slightly interested in the welfare of the Mother Country.

(2) On the other hand, Great Britain had many colonies and foreign possessions, and would naturally feel some delicacy about finally concluding a treaty which affected "real or personal property situated or being within the territories" of such colonies, and as a matter of policy, there were very good reasons for providing that the treaty should be inapplicable to real and personal property situated within the colony, until such colony had been consulted, and notice given or withheld accordingly.

(3) The United States had just concluded a Treaty of Peace with Spain (Treaty of Peace, concluded at Paris, December 10, 1898, II Malloy on Treaties, etc. p. 1690), by which it had for the first time acquired substantial territories beyond the seas. The last paragraph of Article IV is obviously so worded as to apply to

Cuba, as well as Porto Rico, the Philippine Islands and other territories "pertaining to or occupied and governed by the United States beyond the seas." These newly acquired responsibilities, made it important that this country should proceed cautiously, before granting to British subjects rights relating to "real and personal property situated" within those territories.

(4) In addition to all the foregoing, Great Britain had just announced its interpretation of the provision in the Japanese Treaty similar to Article IV, and our representatives presumably accepted that interpretation as applying to the British-American Treaty then being negotiated.

While the Solicitor General, in his brief, states that the construction placed upon Article IV of the Treaty by our State Department, is different from that placed upon it by Great Britain, it does not appear that the interpretation of the State Department has ever been brought to the attention of Great Britain, or that any steps have been taken which would lead Great Britain to conclude that the United States differed in its interpretation of the treaty from that announced by Great Britain at the time the treaty was negotiated. We submit that nothing but the utmost hardship, injustice and want of mutuality (which as we have elsewhere pointed out does not exist in the slightest degree) would justify the State Department in insisting upon an interpretation of Article IV of the Treaty in question, different from that which must have been known to the representatives

of this country who negotiated the Treaty of 1899, and from which interpretation so far as we are aware, this country has never publicly dissented.

In the light of all of the attendant circumstances, and especially in the light of the correspondence between Lord Salisbury and Sir E. Satow, above referred to, which we have reason to believe has not previously been brought to the attention of the Solicitor General, we respectfully submit that the position of the State Department cannot be upheld, and that the views previously announced by Great Britain should prevail.

II.

It appears from the language of the Treaty itself that the restrictions contained in Article IV were intended to be territorial only, and not personal.

It appears from the Preamble to the Treaty that the subject to be dealt with is "the tenure and disposition of real and personal property *situated or being in the territories of the other,*" etc. (our italics).

Article I of the Treaty in question, provides that:

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, *were he not disqualified by the laws of the country where such real property is situated,* such citizen or subject shall be allowed a term of three years in which to sell the same * * *," etc. (our italics).

It appears from the foregoing that the object of a treaty is to remove disqualifications existing "*where such real property is situated.*"

Article IV provides that:

"The stipulations of the present convention shall not be applicable *to any of the colonies or foreign possessions* of Her Britannic Majesty unless notice to that effect shall have been given, on behalf of any such colony or foreign possession * *," etc. (our italics).

We submit that it appears from the very terms of the treaty itself, that the limitations of Article IV were intended to be territorial only. It appears from the Preamble to the Treaty, that the subject matter thereof is real and personal property "situated or being in the territories of the other." Article I undertakes to remove a disqualification existing "by the laws of the country where such real property is situated," and Article IV provides that the removal of such disqualification "shall not be applicable to any of the colonies or foreign possessions of Her Britannic Majesty unless notice to that effect shall have been given * * *."

The very purpose of the treaty being to give to the subjects of each of the parties rights to real and personal property situated in the territories of the other, it naturally follows that any limitations upon that right would be limitations which were territorial and not personal.

Surely, in the light of the interpretation previously announced by Great Britain with respect to a similar

clause in the Japanese Treaty, if it had been the intention of our representatives that the limitations of Article IV should apply to subjects who were residents of the colonies, such representatives would have written into Article IV, words which would clearly express such intention. In other words, the provisions of Article IV would have been made to read somewhat as follows:

"The stipulations of the present convention shall not be applicable to *subjects residing in* any of the colonies or foreign possessions of Her Britannic Majesty."

The very fact that the words italicized or words of a similar import, were not included in Article IV would seem to indicate beyond any doubt, an intention that the limitations contained in Article IV should be territorial only.

The interpretation contended for by the State Department would, we submit, result in very great injustice and hardship.

For instance, under that interpretation a subject of Great Britain, residing in England, France, the United States, or any foreign country, would be entitled to the benefits of the Treaty, but if he happened to cross the border into Canada and become domiciled there, he would thereupon become disqualified. Likewise, if no notice were given by the United States on behalf of the Philippine Islands, a citizen of the United States would be entitled to the benefits of the treaty, if he resided in the United States or England, France or any foreign country, but if he should become domiciled in the Philip-

pine Islands, he would immediately be deprived of the benefits of the treaty.

Under the interpretation contended for by the State Department, the rights of subjects and citizens of the respective Contracting Parties, would become doubtful and uncertain, every time one of them crossed the border into one of the non-adhering colonies or foreign possessions of the Mother Country, and no substantial reason for such restrictions are apparent.

On the other hand, the interpretation placed upon the treaty by Great Britain leaves no doubt or uncertainty as to the rights of any one. Under that interpretation, *all* of the subjects and citizens of the two Contracting Parties, wherever domiciled, are entitled to the rights granted under the treaty. By Article IV, the only restriction is upon the application of the stipulations of the treaty to real and personal property situated in the colonies and foreign possessions of the two Contracting Parties, which restriction may be removed by notice of adhesion as to such colony or foreign possession within the time specified. It is natural and reasonable that the colonies and foreign possessions should be consulted before the treaty is made to apply to real and personal property situated within their boundaries. Article IV as construed by Great Britain is really not a restriction or limitation upon the rights stipulated for, but is merely a means provided for enlarging the scope of the treaty so as to make it apply to real and personal property situated in the colonies and foreign possessions of the two

Contracting Parties as well as in the Mother Country, upon giving notice as provided.

This interpretation is sensible. There is complete mutuality, and there is no uncertainty as to the rights acquired.

Furthermore, under the interpretation adopted by Great Britain, the wishes of the colonies or foreign possessions are to be consulted only with respect to the application of the treaty to real and personal property situated within the boundaries of such colony.

Under the interpretation contended for by the State Department, the colonies or foreign possessions of the Mother Country (whether Great Britain or the United States), by opposing adhesion to the treaty, could limit the rights of subjects of their Mother Country, who might then or thereafter be domiciled within the colony. It is inconceivable that either the United States or Great Britain intended that any of their colonies or foreign possessions should be consulted with respect to what rights they should procure by treaty for any of their citizens or subjects wherever domiciled.

A sovereign power has the right to represent all of its subjects wherever they may be domiciled, and to negotiate treaties securing to them rights in foreign countries, and no reason of policy is apparent why this right should, in the slightest degree, be delegated to any of its colonies or foreign possessions.

We submit that the very terms of Article I and of Article IV of the treaty clearly indicate that the limitations of Article IV were intended to be limitations as to territory only.

III.

The laws of Canada made it unnecessary that notice of adhesion to the treaty should be given in its behalf.

If our contention as to the proper interpretation of Article IV of the treaty is correct, then notice of adhesion on behalf of Canada would have had the effect merely, of extending the application of the stipulations of the treaty to real and personal property situated in Canada. In other words, the disability existing at common law with respect to the right of aliens to take by descent under the laws of Canada, would have been removed to the extent provided in the treaty, so far as citizens and subjects of the United States were concerned.

This common law disability is one which may be removed by treaty, or it may be removed by law enacted by the State, Province or country within which the property is situated.

Notice of adhesion to the treaty apparently has not been given on behalf of Canada, so as to remove the common law disability of citizens of the United States with respect to property situated in Canada, but the same end has been even more effectually accomplished by the enactment of laws both in Ontario, where Jane Kidd, the appellee, resides, as well as in Canada. The laws of Ontario provide (*Revised Statutes of Ontario, 1914, Vol. I, page 1187*):

"On and from the 23rd day of November, 1849, every alien shall be deemed to have had and shall hereafter have the same capacity to take by

gift, conveyance, descent, devise, or otherwise, and to hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in Ontario as a natural born or a naturalized subject of His Majesty."

(See Appendix to this Brief for a more complete reference to the laws of Ontario.)

It is provided in the Revised Statutes of Canada, 1906 (Vol. II, Chap. 77), among other things, as follows:

"Real and personal property of any description may be taken, acknowledged, held and disposed of by an alien in the same manner in all respects as by a natural born British subject."

This provision apparently became effective on July 4, 1883.

(See Appendix to this brief for a more complete reference to the Canadian laws.)

These laws clearly explain the reason why no notice of adhesion was given on behalf of Canada.

Obviously, the Canadian authorities assumed that the interpretation placed upon Article IV by the foreign office of Great Britain was the correct interpretation of that Article, and having granted to the citizens of the United States by its laws previously enacted, more generous treatment than would have been granted by notice of adhesion as provided by the Treaty of 1899, no notice of adhesion was deemed necessary. We submit that it would now seem most unjust, if, after the generous treatment accorded citizens of this country by Canada

and the Province of Ontario, long prior to the negotiation of the Treaty in question, this country should deny to citizens and subjects of Great Britain who happen to be domiciled in Canada, similar treatment with respect to real estate located within the United States, because of a narrow and restricted interpretation of the Treaty of 1899, which public documents plainly show was not intended at the time the Treaty was negotiated.

We again respectfully submit that the judgment of the trial court should be affirmed.

O. H. DEAN,
H. M. LANGWORTHY,
R. B. THOMSON,
R. D. WILLIAMS,
Solicitors for Appellee.

J. E. MADDEN,
W. D. McLEOD,
Of Counsel.

APPENDIX.**Official Correspondence Relating to
Japanese Treaty.**

I, Stephen Gaselee, C. B. E., Librarian and Keeper of the Papers of His Majesty's Foreign Office, do hereby certify that the documents hereto attached are true copies of despatches, dated respectively February 22, 1899, and October 19, 1899, addressed by the Marquis of Salisbury to Sir E. Satow, Her Majesty's Envoy Extraordinary, Minister Plenipotentiary, and Consul-General in Japan.

(Seal)

Stephen Gaselee.

Foreign Office

June 4, 1920.

I certify the above to be the signature of M^r Stephen Gaselee, Librarian and Keeper of the Papers of His Majesty's Foreign Office.

(Seal)

H. Goldes.

No. 52.

The Marquess of Salisbury to Sir E. Satow.

(No. 23)

Foreign Office, February 22, 1899.

Sir,

I have had under my consideration in consultation with the Law Officers of the Crown your despatch, No. 142, of the 6th September, respecting the status of In-

dian and Colonial subjects of Her Majesty residing in Japan, as affected by the Treaty of the 16th July, 1894.

Her Majesty's Government are of opinion that Article XIX of the Treaty has not the effect of limiting the rights of British subjects connected with non-adhering Colonies or possessions. The question as to who are British subjects for the purposes of the Treaty is one of British Law.

Many of the persons resident in the Colonies would be British subjects even if they had been born in a foreign country as being the children or grand-children of natural-born British subjects, and it is impossible to suppose that such persons lose the benefits of this Treaty owing to the fact that they have been born in a British Colony and not in a foreign country.

No test can be suggested for discrimination against persons connected with non-adhering Colonies or possessions. The inhabitants of such Colonies or possessions are generally, and not locally merely, British subjects. They enjoy the privileges of citizenship all over the Empire.

Her Majesty's Government are of opinion that the test of domicile could not be applied in practice and the test of residence which has also been suggested appears to be even more impracticable, as residence varies from time to time and it could not be said of any colonist who came to Japan that he was then resident in the Colony.

It must be recollected that British subjects inhabiting non-adhering Colonies and Dependencies are affected

by this Treaty, inasmuch as when it comes into force it puts an end to the earlier Treaties under which they enjoy a right to exterritoriality.

The fair meaning of the Treaty, in the opinion of Her Majesty's Government, is that all persons who by British Law are recognized as possessing the rights of British citizenship all over the world are entitled to the benefits of its stipulations, and this test includes the inhabitants, being British subjects, of all Colonies and Dependencies whether they adhere to the Treaty or not.

Her Majesty's Government are of opinion that Article XIX does not discriminate between different classes of British subjects, nor create a distinction unknown to British Law and almost impossible of definition, but that its effect is merely to provide that the privileges and obligations of the Treaty shall not ensure for the benefit of non-adhering Colonies and Dependencies. For instance, the produce or manufacture of a non-adhering Colony or Dependency, would not be entitled to the Tariff prescribed by the Treaty.

Should the occasion arise you should inform the Japanese Government of the construction which Her Majesty's Government place upon the Treaty as set forth in the above observations, pointing out the impossibility of the proposed distinction, and that the discrimination introduced by Article XIX is territorial merely and not personal.

I am, etc.

(Signed) Salisbury.

No. 184.

The Marquess of Salisbury to Sir E. Satow.

(No. 89)

Foreign Office, October 19, 1899.

Sir,

I have had under my consideration, in consultation with the Law Officers of the Crown, your despatch No. 133, Confidential, of the 27th July, relative to the question of the rights of Indian and Colonial subjects of Her Majesty to the protection of their industrial property in Japan, as affected by the Treaty between this country and Japan of the 16th July, 1894.

I am advised that British subjects, though residing in or domiciled in Colonies or possessions which have not adhered, are entitled to the benefits of Article XVII of the Treaty, and also of Article II of the International Convention for the Protection of Industrial Property, signed at Paris on the 20th March, 1883, which contains the following provision:

"Les sujets ou citoyens de chacun des Etats Contractants jouiront, dans tous les autres Etats de l'Union, en ce qui concerne les brevets d'invention, les dessins ou modeles industriels, les marques de fabrique ou de commerce et le nom commercial, des avantages que les lois respectives accorderont actuellement ou accorderont par la suite aux nationaux."

The right is conferred on those who are British subjects, and is not lost by their being resident or domiciled either in a foreign country or in a Colony which has not adhered.

The right under the Convention is also conferred by Article III on foreigners domiciled in one of the Contracting States. Of course, domicile in a non-adhering Colony would not be effectual for this purpose, as the test is, in this instance, local, not personal as in the case of British subjects. This distinction is also illustrated by Articles IV and VI of the Convention, which would not apply in the case of non-adhering Colonies.

I am, etc.

(Signed) Salisbury.

Extracts from Laws of Ontario.

Revised Statutes of Ontario, 1914. Vol. I. p. 1187.
Chapter 108.

An Act Respecting the Rights of Aliens in Relation
to Real Property.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act may be cited as The Aliens Real Property Act. 10 Edw. VII, c. 49, s. 1.

2. On and from the 23rd day of November, 1849, every alien shall be deemed to have had and shall hereafter have the same capacity to take by gift, conveyance, descent, devise, or otherwise, and to hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in Ontario as a natural born or a naturalized subject of His Majesty. 10 Edw. VII, c. 49, s. 2.

3. The real estate in Ontario of an alien dying intestate shall descend and be transmitted as if the same

had been the real estate of a natural born or naturalized subject of His Majesty. 10 Edw. VII, c. 49, s. 3.

4. Nothing herein shall alter, impair or affect any right or title legally vested in or acquired by any person before the 23rd day of November, 1849. 10 Edw. VII, c. 49, s. 4.

Extracts from Laws of Canada.

Revised Statutes of Canada, 1906. Vol. II.
Chapter 77.

An Act Respecting Naturalization and Aliens.

Short Title.

1. This Act may be cited as the Naturalization Act.
R. S., Short title, c. 113, s. 1.

* * * * *

Rights of Property of Aliens.

4. Real and personal property of any description may be taken, acquired, held and disposed of by an alien in the same manner, in all respects, as by a natural-born British subject. R. S. c. 113, s. 3.

5. A title to real and personal property of any description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject. R. S., c. 113, s. 3.

6. Nothing in the two last preceding sections shall qualify an alien for any office, or for any municipal, parliamentary, or other franchise, or to be the owner of a British ship; nor shall anything therein entitle an alien to any right or privilege as a British subject, except

such rights and privileges in respect of property as are hereby expressly conferred upon him. R. S. c. 113, s. 3.

7. The provisions of the three last preceding sections shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the fourth day of July, one thousand eight hundred and eighty-three, or in pursuance of any devolution by law on the death of any person dying before the said date. R. S. c. 113. s. 3.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

BARTHOLOMEW SULLIVAN, MARGARET Tholen, John Martin, et al., Appel- lants,	} No. 65.
v. JANE KIDD.	

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.*

BRIEF ON BEHALF OF THE UNITED STATES.

This case, involving rights claimed under a treaty between this Government and the Government of Great Britain, has been remanded to the docket for reargument, with directions that the attention of the Attorney General of the United States and the Attorney General of the State of Kansas be called to it.

Accepting this order as an invitation to present the views of the United States with respect to the treaty in question, the following brief is submitted:

STATEMENT OF THE CASE.

The laws of the State of Kansas make no provision for the inheritance by aliens of lands within that State. The question involved is whether a

subject of Great Britain residing in Canada is entitled to the limited rights of inheritance secured to British subjects by the treaty of March 2, 1899 (81 Stat., p. 1939). The court below sustained the rights claimed under the treaty.

THE TREATY.

The treaty in question, which is printed as an appendix to this brief, recites its object to be—

to improve the condition of the citizens and subjects of each of the respective countries in relation to the tenure and disposition of real and personal property situated or being within the territories of the other, as well as to authorize the representation of deceased persons by the consuls of their respective nations in the settlement of estates.

Article I provides that—

Where, on the death of any person holding real property (or property not personal), within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same—

and shall have certain other rights.

Article II provides that citizens or subjects of each of the contracting parties shall have full power to dispose of their personal property within the territories of the other by testament, donation, or

otherwise, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

Article IV is as follows:

The stipulations of the present convention shall not be applicable to any of the colonies or foreign possessions of Her Britannic Majesty unless notice to that effect shall have been given, on behalf of any such colony or foreign possession by Her Britannic Majesty's representative at Washington to the United States Secretary of State, within one year from the date of the exchange of the ratifications of the present convention.

It is understood that under the provisions of this article, Her Majesty can in the same manner give notice of adhesion on behalf of any British protectorate or sphere of influence, or on behalf of the Island of Cyprus, in virtue of the convention of the 4th of June, 1878, between Great Britain and Turkey.

The provisions of this convention shall extend and apply to any territory or territories pertaining to or occupied and governed by the United States beyond the seas, only upon notice to that effect being given by the Representative of the United States at London, by direction of the treaty making power of the United States.

Article V is:

In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall in the dominions of the

other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation.

Article VI, after providing for the length of time during which the treaty shall be in force, concludes as follows:

The United States or Her Britannic Majesty shall also have the right separately to terminate the present convention at any time on giving twelve months' notice to that effect in regard to any British colony, foreign possession, or dependency, as specified in Article IV, which may have acceded thereto.

No notice has been given making the treaty applicable to Canada.

OPPOSING VIEWS OF THE TREATY.

It is proper to state that the British Government and our State Department have not construed this treaty alike. The ruling of the court below is in accord with the British view. Under this construction it is held that the rights given by the treaty are secured to citizens or subjects of the contracting parties without regard to whether they reside in what may be called the home territory or in the colonies or foreign possessions of the contracting parties, and without regard to whether the colony or possession in which they happen to reside has been brought within the terms of the treaty by the giving of the required notice. The claim is that, in the absence of such a notice on behalf of a particular colony or foreign possession, the rights secured to

citizens or subjects do not extend to property situated in such colony or possession, but that the subjects or citizens of the contracting parties residing there have the same rights as other citizens or subjects with respect to property situated within the home territory of the contracting parties. No notice has been given bringing Canada within the terms of the treaty, and hence the contention is that, while an American citizen acquires no rights under the treaty with respect to property in Canada, a British subject in Canada does acquire these rights with respect to property in the United States. In the same way, of course, it is conceded that a British subject acquires no rights under the treaty to property in Hawaii, although an American citizen residing there does acquire these rights with respect to property situated in England.

The contention of our State Department, on the other hand, is that the limitations provided by Article IV apply both to the citizens or subjects to whom rights are secured and also to the property to which these rights apply. In other words, it is insisted that a subject of Great Britain residing in Canada acquires no rights under this treaty with respect to property in the United States unless Canada has by a proper notice been brought within the terms of the convention.

**A FAIR INTERPRETATION OF THE TREATY SUSTAINS THE
CONTENTION OF OUR STATE DEPARTMENT.**

When this treaty was entered into, Great Britain had throughout the world many colonies and foreign

possessions, and also exercised protectorates over considerable territory and many people. The United States also occupied and governed certain territory beyond the seas.

If the first three articles had been all the treaty, there can scarcely be any doubt that all citizens or subjects of the contracting parties, wherever residing, would have been within the terms of the treaty and would have been entitled to the rights secured with respect to property situated anywhere within the dominion or subject to the Government of either of the contracting parties. The question is, To what extent has the operation of the treaty been limited by Article IV? Does that article leave the description of the persons entitled to the rights secured unlimited and only place a limitation upon the property to which those rights shall attach? The language employed is comprehensive. It is that "the stipulations of the present Convention shall not be applicable to any of the colonies or foreign possessions of Her Britannic Majesty unless notice to that effect shall have been given on behalf of any such colony or foreign possession," and that "the provisions of this Convention shall extend and apply to any territory or territories pertaining to or occupied and governed by the United States beyond the seas only upon notice to that effect being given by the Representative of the United States at London, by direction of the treaty-making power of the United States." Manifestly, the purpose was that each contracting party should be able to acquire for its colonies or

foreign possessions, by giving this notice, some rights which these colonies or possessions would not otherwise have. If the construction adopted by the court below is correct, its subjects residing in these colonies or possessions would already have the right to inherit property in the same way that any other subject might inherit and without regard to whether they resided in a colony which had not been brought within the terms of the treaty. The giving of the notice, therefore, secured no additional rights. On the contrary, its effect would be simply to confer additional rights upon citizens or subjects of the other contracting party by permitting them to inherit property in such colony which they could not otherwise have inherited. It would seem, therefore, that the bringing of the colony within the terms of the treaty by notice would, so far as the interests of residents of that colony are concerned, be an idle ceremony. There could have been no object, in the first instance, in excluding such a colony from the provisions of the treaty unless the contracting party at that time was not willing to concede the rights secured by the treaty with respect to property in that colony. On the other hand, there could have been no object in the other agreeing that the colony might be brought within the terms of the treaty by notice unless the subjects or citizens of such contracting party would thereby secure rights which had been denied by the original treaty. Under this construction, a subject of Great Britain residing in Canada would be denied the rights secured to other subjects of Great Britain

with respect to property in the United States, for the very good reason that citizens of the United States were denied the same rights with respect to property in Canada.

When the treaty was made the parties, of course, had the power to make it applicable to all persons and all territory over which they, respectively, had jurisdiction. On the other hand, they had the right to exclude from its operations certain portions of their territory and, at the same time, to exclude such of its subjects or citizens as resided in the excluded territory. It would scarcely be held, however, that the one was excluded and the other included unless the language employed may not fairly bear any other construction. The language excluding the colonies or foreign possessions is not limited, but applies to all "the stipulations of the present Convention." All of these stipulations are to be extended to the colonies or possessions of each contracting party by a mere notice given by that party. A construction that would permit this notice to acquire for the party giving it rights without granting some reciprocal rights to the other party would do violence to the common sense of the parties entering into the convention. The language used does not require such a construction. On the contrary, the natural construction is that, until notice is given, the colonies or foreign possessions and their inhabitants are excluded from the operation of the treaty.

There are some other provisions of the treaty which strongly support this contention. Thus, it is pro-

vided that Great Britain may give notice of adhesion "on behalf of any British protectorate or sphere of influence, or on behalf of the Island of Cyprus." Presumably, the people over whom Great Britain exercises a mere protectorate are not British subjects and would not be within the provisions of Article I. Of course it was contemplated that something would be accomplished by this notice of adhesion. In the territory over which the protectorate is exercised there may be many British subjects residing. Since that territory, however, was not within the terms of Article I, British subjects residing there would be entitled under the treaty to all the rights of British subjects residing elsewhere than in colonies or foreign possessions as to which notice of adhesion had not been given. To bring these protectorates within the terms of the treaty would not be necessary, then, to acquire any rights for British subjects residing there. Nothing was to be accomplished by this provision unless it was to secure the rights of the treaty to people not British subjects, but under a British protectorate, upon the granting of reciprocal rights to citizens of the United States with respect to property within the territory under such protectorate. This provision, which is a part of Article IV, must, if it means anything, be held to apply to the persons as well as the property affected by the terms of the treaty. It thus throws some light upon the meaning of the other paragraphs of Article IV, which apply to colonies or foreign possessions.

Again, in Article VI, both parties reserve the right to terminate at any time, on 12 months' notice, the Convention as applied to any colony, foreign possession, or dependency. It is not conceivable that either party would have given the right to the other to terminate the treaty with respect to a particular colony unless the effect would be to cancel some reciprocal rights. In other words, the United States would scarcely be willing that Great Britain should cancel a part of a treaty which gave rights to its citizens unless the rights which it gave to the subjects of Great Britain residing in that colony should also be canceled.

It is respectfully submitted that the ruling of the court below was erroneous and should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

APPENDIX.

Convention between the United States of America and the United Kingdom of Great Britain and Ireland relating to the tenure and disposition of real and personal property. Signed at Washington, March 2, 1899; ratification advised by the Senate, March 22, 1900; ratified by the Queen, June 18, 1900; ratified by the President, July 16, 1900; ratifications exchanged, July 28, 1900; proclaimed, August 6, 1900.

WILLIAM McKINLEY,

PRESIDENT OF THE UNITED STATES OF AMERICA.

To all to whom these Presents shall come, Greeting:

Know Ye, that whereas a Convention between the United States of America and Great Britain, relating to the tenure and disposition of real and personal property, was concluded at Washington on the 2d of March, one thousand eight hundred and ninety-nine, the original of which Convention, being in the English language, is, as amended by the Senate of the United States, word for word as follows:

"The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, desiring to improve the condition of the citizens and subjects of each of the respective countries in relation to the tenure and disposition of real and personal property situated or being within the territories of the other, as well as to authorize the representation of deceased persons by the Consuls of their respective nations in the settlement of estates, have resolved to conclude a

convention for those purposes and have named as their Plenipotentiaries:

"The President of the United States of America, the Honorable John Hay, Secretary of State of the United States of America; and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honorable Sir Julian Pauncefote, Knight Grand Cross of the Orders of the Bath and of St. Michael and St. George, Ambassador Extraordinary and Plenipotentiary of Great Britain;

"Who, having exchanged their said full powers found in due and proper form, have agreed to and signed the following articles:

"ARTICLE I.

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn.

"ARTICLE II.

"The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other,

by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

“ARTICLE III.

“In case of the death of any citizen of the United States of America in the United Kingdom of Great Britain and Ireland, or of any subject of Her Britannic Majesty in the United States, without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the Nation to which the deceased person belonged of the circumstance, in order that the necessary information may be immediately forwarded to persons interested.

“The said consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors, until they are otherwise represented.

“ARTICLE IV.

“The stipulations of the present Convention shall not be applicable to any of the Colonies or foreign possessions of Her Britannic Majesty unless notice to that effect shall have been given, on behalf of any such Colony or foreign possession by Her Britannic Majesty's Representative at Washington to the United States Secretary of State, within one year

from the date of the exchange of the ratifications of the present Convention.

"It is understood that under the provisions of this Article, Her Majesty can in the same manner give notice of adhesion on behalf of any British Protectorate or sphere of influence, or on behalf of the Island of Cyprus, in virtue of the Convention of the 4th of June, 1878, between Great Britain and Turkey.

"The provisions of this Convention shall extend and apply to any territory or territories pertaining to or occupied and governed by the United States beyond the seas, only upon notice to that effect being given by the Representative of the United States at London, by direction of the treaty making power of the United States.

"ARTICLE V.

"In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the High Contracting Parties shall in the Dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation.

"ARTICLE VI.

"The present Convention shall come into effect ten days after the day upon which the ratifications are exchanged and shall remain in force for ten years after such exchange. In case neither of the High Contracting Parties shall have given notice to the other, twelve months before the expiration of the said period of ten years, of the intention to terminate the present Convention, it shall remain in force until the expiration of one year from the day on which

either of the High Contracting Parties shall have given such notice.

"The United States or Her Britannic Majesty shall also have the right separately to terminate the present Convention at any time on giving twelve months' notice to that effect in regard to any British Colony, foreign possession, or dependency, as specified in Article IV, which may have acceded thereto.

"ARTICLE VII.

"The present Convention shall be duly ratified by the President of the United States, by and with the approval of the Senate thereof, and by Her Britannic Majesty, and the ratifications shall be exchanged in London or in Washington.

"In faith whereof we, the respective Plenipotentiaries, have signed this Treaty and have hereunto affixed our seals.

"Done in duplicate at Washington, the second day of March, one thousand eight hundred and ninety-nine.

"JOHN HAY [SEAL.]

"JULIAN PAUNCEFOTE [SEAL.]"

And whereas the Convention has been duly ratified, as amended, on both parts, and the ratifications of the two Governments were exchanged in the city of Washington on the 28th day of July, one thousand nine hundred.

Now, therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention, as amended, to be made public, to the end that the same and every

article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this sixth day of August in the year of Our Lord one thousand nine hundred and of the Independence of the United States, the one hundred and twenty-fifth.

[SEAL.]

WILLIAM MCKINLEY.

By the President:

ALVEY A. ADEE,

Acting Secretary of State.



